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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 861

VALMORE J. FORGETT, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on February 28, 1966, and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. The Grant of Certiorari in Costello v. United States, No. 826, Oct. Term, 1965.

On March 21, 1966, following the denial of certiorari in the instant case, this Court granted certiorari in *Costello* v. *United States,* No. 826, Oct. Term, 1965, limited to the question whether "the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment" and whether this Court, "especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board,*" 382 U.S. 70, should overrule *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419. Substantially the same question is posed and pending before this Court in the following petitions for writs of certiorari filed in October Term 1965: No. 823, *Marchetti* v. *United States;* No. 848, *Markis* v. *United States;* No. 849, *Piccioli* v. *United States;* No. 902, *Millo* v. *United States;* No. 906, *Grassia* v. *United States;* and No. 951, *Moretti* v. *United States.*

While the instant case involves the constitutionality of the registration provisions (§ 5841 as incorporated by § 5855) of the National Firearms Act, much of the same considerations are involved as will be before this Court in *Costello* when it reconsiders the validity of the federal wagering tax registration requirements. In the earlier decision now to be reconsidered, *United States* v. *Kahriger,* 345 U.S. 22, 25, 32, this Court in part premised the validity of the wagering tax registration requirements by referring to *Sonzinsky* v. *United States,* 300 U.S. 506, 513, where the basic validity of the National Firearms Act was sustained as a revenue measure. And *Kahriger* also placed heavy reliance on *United States* v. *Sullivan,* 274 U.S. 259, the

income tax return filing case which played a significant role in the analysis of the court below affirming the validity of the firearm registration requirements.

Indeed, the whole tenor of the matters to be reviewed in *Costello* bears a striking resemblance to the considerations necessarily involved in the instant case. Does the person registering under the wagering tax provisions, like the person registering a firearm, thereby admit a violation of law? Does the fact that the wagering tax laws, like the National Firearms Act, are revenue-producing measures excuse or justify the seeming invasion of Fifth Amendment rights? Can such compelled disclosures of criminal violations be permitted in light of more recent decisions of this Court under the Fifth Amendment, such as the *Albertson* decision?

The close identity of issues in this case and in the *Costello* case—and in the six related pending petitions—amply justifies a reconsideration of the denial of certiorari here. In fact, it would be quite appropriate for this Court to hear and consider the instant case at the time it hears and considers the *Costello* case, thereby exploring a wider range of federal registration requirements. That appropriateness is underscored, moreover, by the confusion created under the National Firearms Act by the conflicting circuit views as to the constitutionality of the registration requirements. See *Russell* v. *United States,* 306 F. 2d 402 (C.A. 9), and *Dugan* v. *United States,* 341 F. 2d 85 (C.A. 7), holding those requirements invalid under the Fifth Amendment. And much of what has been said and held with respect to firearms registration is most relevant to the dialogue that will occur before this Court in *Costello.*

For these various reasons, therefore, the denial of certiorari should be reconsidered to the end that this case be heard and resolved simultaneously with the *Costello* case.

2. The Violation of the Principles of Cole v. Arkansas, 333 U.S. 196.

Petitioner clearly was entitled, as a matter of due process, to have the validity of his conviction appraised by the Court of Appeals "on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole* v. *Arkansas,* 333 U.S. 196, 202. But that principle was egregiously violated by the court below; and this error—which is of constitutional proportions—was repeated and amplified in the Government's Brief in Opposition before this Court.

The affirmance below was premised on the theory that "the gist of the offense was the unlawful shipment of unregistered firearms in interstate commerce," Pet. App. 8a, without regard to any duty on the petitioner himself to effectuate registration. The same concept as to the "gist of the offense" is repeated by the Solicitor General at page 6 of the Brief in Opposition. But petitioner was never indicted, tried or convicted on that theory.

Rather he was charged and tried for the offense of shipping firearms "without having registered the said firearms with the Secretary of the Treasury or his delegate as required by Section 5841." D.A. 1. The pre-trial opinion of Judge Kalbfleish, in recognition of this language in the indictment, ruled that petitioner's guilt, "if it be ascertained, could only under the facts as charged be premised upon *his failure to register pur-*

suant to Section 5841." Pet. App. 2a; emphasis added. And Judge Battisti charged the jury that one of the essential elements of the crime, which had to be proved by the Government, was that "the defendant was required to register all or any of these firearms." G.A. 366.

Yet the most careful examination and analysis of the record shows not a scintilla of evidence, of any kind or description, either direct or circumstantial, that the petitioner was in fact required to register in accordance with § 5841—as the indictment had charged. But the Court of Appeals completely ignored that fatal flaw in the evidence. And it did so by propounding a new version of a § 5855 offense, one with which petitioner had never been charged and for which he had never been tried. The gist of the offense suddenly and dramatically shifted from one of transporting firearms which the defendant himself was required to register to one of transporting firearms which no one had ever registered. By that sleight of judicial hand, it became irrelevant under the court's theory that there was no evidence that petitioner himself had a duty to register the firearms under § 5841. Thus petitioner's conviction was sustained on a new theory of law which removed the burden on the Government, as recognized by the trial court, to produce evidence of petitioner's duty to register and which rubber stamped the sufficiency of the other evidence which was adduced.

Petitioner was thereby deprived of his right to have his conviction reviewed on the basis of the theory of the indictment, the pre-trial opinion, and the charge to the jury. Contrariwise, petitioner has been denied any right to a trial on the new theory advanced by the

Court of Appeals and repeated before this Court by the Solicitor General. This combination of circumstances is so grossly violative of the principles of *Cole* v. *Arkansas, supra,* as to call for a re-evaluation of the denial of certiorari and to permit petitioner's conviction to be appraised on the basis of the charges actually made against him.

3. The Complete Lack of Evidence as to the Transportation of "Firearms" as Defined in the Act.

The Petition for Writ of Certiorari, p. 3, reserved the right to "argue the additional question whether a conviction under § 5855 can be sustained in the absence of any competent evidence that any of the unregistered weapons shipped in interstate commerce were in fact firearms within the meaning of § 5848 of the Act." Such evidence was so completely absent as to call for the exercise of this Court's supervisory power over the administration of criminal justice in the federal courts and for the reversal of the judgment below.

Not every type of weapon shipped in interstate commerce comes under the spread of the National Firearms Act. The only weapons regulated and controlled by the Act are those defined to be "firearms" by § 5848(1). Recognizing this fact, the indictment charged petitioner with shipping weapons in interstate commerce which "were firearms within the purview of § 5848." That section defines a firearm as follows:

> "A shotgun having a barrel or barrels of less than eighteen inches in length, or a rifle having a barrel or barrels of less than sixteen inches in length or any weapon made from a rifle or shotgun . . . if such weapon as modified has an over-

> all length of less than twenty-six inches or any other weapon, except a pistol or revolver from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun. . . ."

The Government, of course, has the burden in a criminal case to prove every essential element of the crime charged, every fact and circumstance essential to the guilt of the accused. *Grunewald* v. *United States,* 353 U.S. 391. To support the conviction in the instant case, the Government was therefore required to prove that the petitioner shipped weapons in interstate commerce and that those weapons were within the statutory definition of firearms.

In *United States* v. *Anderson,* Criminal No. 15951 in the District Court for the District of Columbia, the court ruled that

> "The gun . . . must be capable of using the energy of explosive in the fixed shotgun shell to fire through a smooth bore . . . which necessarily implies that there must be some mechanism to bring about the firing of a shotgun shell to make a firearm or a shotgun within the definition of the statute. . . . Where the alleged weapon is so defective because of some mechanical defect in its structure that it cannot be fired . . . it does not come within the definition of a firearm."

In *United States* v. *Thompson,* 202 F. Supp. 503 (N.D. Cal.), the court held that the

> ". . . determination of what is and what is not a 'firearm' depends in great part upon whether the particular object in question will or will not propel a shot through explosive energy."

In that case the court held that a shotgun without a firing pin is not a firearm within the jurisdiction of the National Firearms Act.

Now in the recent case of *United States* v. *Kokin,* (D.N.J., Crim. No. 268-64), the court on stipulated facts found that there was no sale of a "firearm" within the meaning of the Act where a gun dealer sold an M1 Carbine, which is a semi-automatic rifle, together with a complete set of M2 Carbine parts, which when installed in the M1 Carbine would make a fully automatic machine gun, and the dealer also furnished an Army Field Manual describing the steps necessary to convert the M1 Carbine and the M2 parts into a fully operable M2 machine gun. The court said "The violation—if consummated at all—must have resulted from the simultaneous mailing of the M1 Carbine and the M1 stock plus the enumerated M2 Carbine parts."

Assuming that these various elements could be readily employed in the construction of a M2 Carbine rifle, the court in *Kokin* could not find the presence of such a weapon in the sale itself. In the court's words, "this is not to say that such transactions may not defeat the spirit of the firearms legislation. The particular activity, however, is not proscribed by the letter of that Act . . . If the transaction here discussed be determined dangerous or otherwise within the regulatory intent of the National Firearms Act, the proper remedy rests in proper legislative amendment. This Court cannot on these facts conclude . . . sale to be a transfer of M2 Carbine rifle. *To do so would violate the most basic concepts of due process.*" [Emphasis added.]

Thus it appears from all of the cases which have considered this question that in order for a weapon

to be considered a "firearm" under the Act, it must be an operable weapon capable of discharging a shell. To be a machine gun within the definition, the mechanism must be complete and operable with all the parts necessary to discharge automatically by an explosive charge, more than one shot without manual reloading by a single function of the trigger. The burden of proof rests with the Government.

In the instant case none of the weapons introduced in evidence were shown to come within that definition. Agent Holmes, the Supervisor of the Alcohol & Tobacco Tax Division of the Internal Revenue Service who allegedly inventoried the weapons which form the basis for the instant indictment and conviction, responded as follows to a short series of questions on cross-examination:

> "Q. Can you tell us whether in 1959 when you looked at these weapons they were operable machine guns?
> A. No, sir, I can't tell you that.
> Q. You don't know?
> A. No, sir, I do not know."

An examination of the evidence offered by the Government, viewed in the most favorable light to the Government, reveals no testimony whatsoever that any of the weapons introduced in evidence and testified to were capable *at the time of seizure* of discharging a shot by an explosive and there was no evidence as to barrel length, overall length, or automatic capabilities. Only seven weapons were marked in evidence, which weapons were identified as follows: Exhibit 5 identified by Mark C. Holmes, a Supervisor of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, as a German Schmeisser machine pistol, serial No.

10954; Exhibit 6 identified by Mr. Holmes as a United States carbine M-2 with Serial No. 6917574; Exhibit 7 identified as a German M-P44 machine pistol 44, Serial No. 3860; Exhibit 8 identified as a Czech gun with a name Brno, Serial No. 6507; Exhibit 9 was identified as a Russian machine gun, Serial No. 505; Exhibit 10 was identified as a German light machine gun, Serial No. 5378; Exhibit 11 was identified as a United States Browning machine gun, 50 calibre, Serial No. 852045.

The Government introduced the testimony of Warren Danison, a sergeant in the Ohio National Guard, who testified that he test fired weapons bearing the following serial numbers: 1290513, 747199, 1 W 2735, 271940, 500066, 1806344, 548506, 1360774, 1428422, 1867905, 524269, 720786, 852045, 7189, 0078, 42923.

Note that only one of the weapons which were testified to by Sergeant Danison was introduced in evidence by the Government. There is no evidence in the record to show that any of the guns which were test fired by Sergeant Danison were previously in the possession of the petitioner or were taken from the truck in question. The one weapon introduced by Holmes, which was test fired by Danison, was admittedly not an operable weapon when seized. That weapon had no back plate or trigger housing. It was basically a barrel and barrel receiver without any capability of shooting either single shot or automatically. The petitioner objected to the admissibility of Sergeant Danison's testimony on the ground that it was irrelevant and immaterial—which objection was overruled. As may be seen from the foregoing, the only evidence before the jury was as follows:

1. Seven weapons were seized at the Ravenna Arsenal.

2. Fifteen weapons, 14 of which were different from the seven shown to have been examined by Mr. Holmes, were test fired by Seargeant Danison. The other weapon was inoperable when seized.

As a matter of law, neither a judge nor jury could properly draw a conclusion from the evidence so introduced that petitioner had shipped "firearms" within the purview of § 5848.

In view of the foregoing, the petitioner prays that the Court, in protection of petitioner's constitutional rights, exercise its general supervisory power to review the record and to reverse the judgment below on the grounds that there was insufficient evidence to support a conviction of having shipped "firearms" within the meaning of the Act.

CONCLUSION

On March 22, 1961, petitioner was indicted under § 5855 of the National Firearms Act for shipping weapons in interstate commerce, which were firearms as defined by the Act, without *his* having registered them as required by the Act.

Since that time uncountable man hours have been devoted to this case by attorneys for the petitioner, attorneys for the Government, and numerous judges and justices of the federal bench at all levels. After five years of litigation the law with respect to the interpretation of the National Firearms Act has moved from a posture of doubtful ambiguity to a state of utter confusion. The only clear and certain fact that emerges from all of these proceedings is that this petitioner has been convicted and that his conviction

has been affirmed on a theory wholly different from that on which he was tried. He has been convicted of a felony for violation of a statute which, although characterized as a taxing statute, is in fact an intricately devised collection of controls upon certain aspects of organized crime and racketeering.

And yet the petitioner is neither a felon nor a racketeer nor a cog in the wheel of organized crime. He is and has been since a very early age a devoted collector of weapons of all kinds and is now at age 35 a leading authority on weaponry and its history. His company, among other things, produces for sale fine replicas of black powder and ball, muzzle loading, civil war rifles and pistols. He is a devoted husband and father, a civic-minded respected member of his community who served honorably in the United States Army and who has continued to serve his Government's agencies with his expertise whenever called upon. His business provides employment for others, adds to the economy and provides a source of fine collectors' items for other weapons enthusiasts and historians. He has contributed unstintingly of his time to the Smithsonian Institution, the Marine Corps Museum, the West Point Museum and other national historical institutions and has contributed numerous weapons of historical significance to these institutions, including a gift to the Marine Corps Museum of the first Maxim machine gun which was hand made by its inventor.

The advice "Go west, young man" might well have been heeded by this petitioner, for if, after his truck was loaded with weapons in Oconomawoc, Wisconsin, it had proceeded in a westerly direction into the Ninth or Seventh Circuits, it is clear that the petitioner

would not be a convicted felon today; for those Circuits have held the registration provision of the National Firearms Act unconstitutional and therefore no one can be convicted in those Circuits for the crime of shipping firearms which he failed to register. Unfortunately for this petitioner, his truck turned east into the sphere of influence of the Sixth Circuit, which Circuit has ignored or distinguished the decisions of the Ninth and Seventh Circuits and has propounded its own interpretation of the National Firearms Act—an interpretation inconsistent with that of the other Circuits and even divorced from the law propounded by the trial courts within its own Circuit.

There is thus no uniform law of the land today with respect to the registration and shipment of firearms in interstate commerce. Unless this Court clarifies the law, whether an arms dealer or collector is an honest man or a criminal remains completely dependent upon the Circuit in which he resides or conducts his business. Every step now taken by a licensed firearms dealer or collector under the present status of the law is taken at his peril, for he cannot know what his obligations and limitations are. In fact if this Court would but examine this law it would find that there is no way a person can confidently take possession of any firearm, for possession of a firearm which has *at any time* been illegally transferred is a crime, and there are no procedures for ascertaining whether or not any given weapon is an "illegal" firearm.

The complexity and difficulty of the law is demonstrated by the fact that two full days of oral argument on the constitutional questions urged by the petitioner were required before the trial court felt that it had a sufficient grasp of the interaction of the various

statutes to deal with the issues. Judge Battisti, although then noting his disagreement with the decision of Judge Kalbfleish, on a previous motion by the petitioner to dismiss the indictment, that the statutes were enforceable, ruled that Judge Kalbfleish's decision would nevertheless be the law of the case. Included in the decision of Judge Kalbfleish was an analysis of the essential elements of the offense, including the burden on the Government to prove petitioner's duty to register under § 5841. Normally a defendant must rely in preparing his defense upon his own understanding of the law but the petitioner presented his defenses in this case with Judge Kalbfleish's decision in his hand, relying upon the judge's statement of the Government's burden of proof and of the required elements of the offense. When the Government failed to meet that burden and failed to prove the essential elements, petitioner moved for an acquittal. When his motion was denied, he appealed, at which time and for the first time the Court of Appeals announced that there was no such burden upon the Government.

In addition, petitioner has argued at every stage of the proceedings that the Government was required to show that the weapons which were shipped were operable firearms. The record is devoid of any such showing; and yet, neither of the courts below has recognized the insufficiency of this aspect of the case. As a convicted felon convicted for what District Court Judge McNamee said was an "administrative error", this petitioner is denied by the operation of the Magnussen Act the privilege of continuing to operate the business he had established after fifteen years of long hours and hard labor, which deprivation is based upon a conviction founded on statutes which defy consistent

interpretation, have been applied ambiguously and inconsistently and which conviction has been sustained on facts so lacking in sufficiency as to demand this Court's review.

Petitioner recognizes that the firearms business is unpopular. It may often encompass the worst elements of our community and the complexity of the laws which regulate that business may not not warrant this Court's attention; but this petitioner, who has been deprived of his property without due process and who has been found guilty of violation of a law held unconstitutional in two federal circuits, warrants this Court's attention. For the foregoing reasons and for the reasons set forth in the original petition, petitioner prays that this Court will reconsider his application for issuance of a writ of certiorari.

Respectfully submitted,

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March 25, 1966

CERTIFICATE OF COUNSEL.

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

CHARLES J. IRWIN